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IN THE

Supreme Court of the United States

DAVID G. HOUSLER, JR.,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Tennessee

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the State of Tennessee introduce as evidence a Defendant's statement knowing that material components of the statement are false without redacting or correcting the false portions?

2. Whether due process guarantees are violated when the State of Tennessee prosecutes two individuals for the same crime at separate trials using inconsistent theories that are mutually exclusive?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits, The Supreme Court of Tennessee, appears as *State v. Housler*, Case No. M2002-00419-SC-R11-CD (May 19, 2006), is unpublished, and is attached to this petition as Appendix A.

The opinion of Court of Criminal Appeals of Tennessee appears as *State v. Housler*, No. M2003 -00419-CCA-R3-CD (Tenn. Crim 02/27/2004), is unpublished, and is attached to this petition as Appendix O.

Certain findings of fact and conclusions by the trial judge are included in the Appendix. These findings were made in this case at the trial level and in the related case of *State v.*

Mathews, Montgomery County, Tennessee Circuit Court, Case No. 33791. These findings are attached to this petition as Appendices B, L, and M.

STATEMENT OF JURISDICTION

The Supreme Court of Tennessee issued an opinion denying relief on May 19, 2006. No petition for rehearing was filed. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION:

Fourteenth Amendment Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection - Section. 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Unless otherwise noted, the statutes and rules cited in this brief are the versions that were in effect at the time of Petitioner's offense.

STATEMENT OF THE CASE

Introduction

This case involves two prosecutions for one crime. In January, 1994 four employees were killed after closing at the Taco Bell restaurant in Clarksville, Tennessee. In 1996 a jury convicted Courtney Mathews for the murders of the four

employees. In 1997 a different jury found David Housler guilty of the four murders. Circuit Judge John Gasaway presided over both trials. This Petition raises two due process issues, inextricably related.

First, Petitioner contends his due process guarantees were violated when the State of Tennessee used false evidence before the grand jury and the trial jury. The false evidence was Petitioner's statement which was known to be materially false. There is no issue of fact as to whether the statement was materially false or whether the falsity was known. Pretrial prosecutors and state investigators admitted that material components of the Housler statement were false.[1] The trial court recognized before trial that material components of the statement were false.[2] The Supreme Court of Tennessee found that Housler's confession contained "many known factual falsehoods."[3] Yet the confession was admitted, unredacted and uncorrected, and was the primary piece of evidence against Housler. Second, Petitioner contends that his due process guarantees were violated by irreconcilably inconsistent prosecutions that were mutually exclusive. There is no issue of fact as to whether the prosecutions were inconsistent. After the Housler trial the trial judge specifically found that the prosecutions were mutually exclusive.[4] This finding is logically consistent with the admitted falsity of the statement. Because the Housler statement was materially false it naturally contradicted the truthful competent evidence admitted against Mathews, and thus, resulted in irreconcilable prosecutions which the trial judge specifically found to be mutually exclusive.

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[1] Pet. App. D 44a-67a; Pet. App. E 76a; Pet App. F 91a-93a,102a-108a,114a,118a,123a125a.

[2] Pet. App. P.

[3] Pet. App. A 12a,19a.

[4] Pet. App. L185a-191a; Pet App. M 204a-208a.

The Crime

Early Sunday, January 30, 1994, Courtney Mathews robbed the Taco Bell restaurant in Clarksville, Tennessee after closing and killed four co-workers with a 9 mm gun. A safe in the business office of the restaurant had been blown open by a shotgun blast and $2967.68 was missing. Pet. App. A 2a.

The crime garnered local outrage and national media attention, and within days Mathews, a newly-hired part-time employee of the restaurant, was arrested and charged with the murders and robbery. Mathews was a soldier stationed at nearby Fort Campbell, Kentucky. Pet. App. A 2a.

Work records showed that on Saturday, January 29, 1994, Mathews clocked in to work at Taco Bell at 2:10 p.m., clocked out for a break at 7:39 p.m., clocked back in at 8:12 p.m., and ended his shift at 9:11 p.m. Pet. App. A 2a.

Mathews resided on Ryder Avenue in Clarksville, four to five miles from the Taco Bell. According to Carl Ward, Mathews' roommate at the time, Mathews arrived home from work at 9:30 p.m. on the night of the murders and went into his room where he placed a shotgun, a 9 mm handgun, either a .22 or.25 caliber handgun, and shells and ammunition in a book bag. Mathews also grabbed a bowling-ball bag, black gloves, white latex gloves, spent some time talking to his father in New York, and then left the apartment alone. Ward testified that when Mathews left the house, he was wearing two layers of clothes, and a black three-quarter length coat. Before he left, Mathews told Ward, who had been examining the guns, to wipe his prints from them. Pet. App. A 2a; Pet. App. C 35a-43a.

A Taco Bell employee, Jelaine Walker, saw Mathews inside the restaurant later[5]. Walker observed Mathews crouch-

[5] Walker left soon thereafter, and did not stay to close the restaurant, probably saving her life.

ing behind a trash can in the dining area. Mathews said to Walker, "I am gone, you don't see me." Company policy prohibited entry of anyone into the restaurant once the dining area was closed at midnight. The drive-through lane generally remained open until 1:00 or 1:30 a.m. Pet. App. A 2a-3a.

Investigation of the crime scene revealed a disrupted ceiling tile in the men's bathroom that appeared to have been moved to create an opening after someone had been hiding above. A forensic specialist from the Tennessee Bureau of Investigation (TBI) later confirmed that Mathews' fingerprints were on a fan vent near the displaced tile. Pet. App. A 3a.

Witness Frankie Sanford placed an order from the drive-through lane of Taco Bell at 1:30 a.m. Inside the restaurant he saw, alive and well, each of the four victims working as normal; he also saw Mathews, in uniform, working. Pet. App. A 3a.

When John Ballard, a shift manager at the Taco Bell, stopped by the drive-through window at approximately 1:45 a.m. the employees were engaged in normal closing activities. Klopp, the evening manager at Taco Bell on the night of the killings, told Ballard that they had been very busy and hence were unable to close the drive-through window until 1:30 a.m. Ballard left the restaurant around 2:00 a.m. Pet. App. A 3a.

Witness Allen Ceruti, who at the time was employed by the Tennessee Department of Correction, drove by the Taco Bell at 4:30 a.m. He testified that he saw an African-American male partially open the metal rear door of the Taco Bell restaurant from the inside. Mathews is African-American. Housler is Caucasian. Pet. App. A 3a.

Investigators searched the interstate for evidence. Underneath the Red River Bridge on I-24, they collected several items of clothing, pieces of a latex glove, and other sundry items. One of the clothing items recovered was a three-quarter length black jacket. Forensic investigators determined

that a stain on the jacket was the blood of victim Kevin Campbell. Also, plastic fragments lodged in the coat were determined to be of the same type plastic as the plastic dial blown off the safe. Pet. App. A 5a.

Ward, Mathews roommate, identified the jacket from under the bridge as the one that Mathews was wearing on the night of the murders; and also testified that he had not seen the coat since that time and that Mathews, when he left their apartment on the night of the murders, said that no one would see the clothes he was wearing again. Ward further stated that on the Tuesday after the murders, Mathews attempted suicide in their apartment. On that evening, Mathews told Ward, while crying, "I don't deserve to live. I killed four people." Pet. App. A 5a.

Between the Sunday of the murders and his attempted suicide, Mathews told Shawntea Hooks, Ward's girlfriend, how he believed the perpetrator committed the crime:

> Well, he told me that whoever did it, they went into the Taco Bell before it closed, they went into the men's bathroom and climbed into the ceiling, waited until the store closed. They came down . . . and he said they killed two people in the front of the store and two in the back.

Pet. App. A 5a.

Shawn Peghee worked with Mathews at Fort Campbell in the mailroom. On the Friday before the murders, Mathews asked Peghee questions about the safe in the mailroom and whether one would be able to open the safe by shooting it. According to Pehgee, as Mathews left the mailroom, "he sort of looked back at me with a smile on his face, sort of a smirk, and he said something big was going to happen that weekend." Pet. App. A 5a-6a.

Fitz Dickson, who had known Mathews for eleven years, testified that he purchased a 9 millimeter gun for Mathews in late 1993. Dickson also testified that he saw Mathews buy

ammunition for the gun on the same day that he purchased it from him. Pet. App. A 6a.

During a search of Mathews' residence, investigators recovered several bullet fragments that Mathews had fired into the floor of this bedroom during an argument before the murders. A TBI forensic scientist testified that a cartridge case and numerous bullet fragments recovered from Mathews' apartment came from the same 9 millimeter weapon as the cartridges and bullets recovered from the crime scene and the victims' bodies. Pet. App. A 6a.

A plastic bag containing a disassembled Winchester shotgun was later found hidden behind Mathews' residence. Shawn Depto, Mathew's friend, informed investigators that he loaned Mathews the shotgun and shells before the murders. Forensic examiners determined that the lead slug used to shoot open the Taco Bell safe was fired from this shotgun. Shells, provided by Depto, matched the slug and shells collected from Taco Bell. Pet. App. A 6a.[6]

How Housler Got Involved

On January 23, 1994 (a week before the Taco Bell murders), Petitioner David Housler committed a street robbery in Clarksville near Grandpa's restaurant. On March 7, 1994, TBI Agent Jeff Puckett and Detective George Elliott of the Clarksville Police Department interviewed Housler at Fort Campbell, Kentucky. Housler was a 19 year old soldier stationed at Fort Campbell; and at the time, he had been detained by military authorities for being absent without leave. Detective Elliott suspected Housler of the Grandpa's

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[6] Sanford, Ceruti, Peghee, Dickson, Depto, Shawntea Ward, (Hooks), and several other witnesses (Antaya, Maurizzio, and Tansil) were called by the State in the Mathews trial. The State did not call them in the Housler trial. See discussion below @ pp. 21-22; see also Pet. App. N (witness lists).

robbery, and the investigators also asked about Taco Bell. During the course of the interview, Housler denied involvement in the Taco Bell murders and stated that on that night he attended a party at Kevin Tween's mobile-home in Oak Grove, Kentucky. His best recollection was that he stayed there all night with his girlfriend, Sulyn Ulangca. He also stated that on January 21, a week and a day before the murders, he and Sulyn may have attended a party at the same trailer; and that he did not know Mathews. Housler was arrested for the Grandpa's robbery on March 9, 1994. Pet. App. A 7a.

In the Montgomery County Jail, David Housler heard much talk about the Taco Bell murder/robberies and believed he could help himself by providing information to assist the Mathews prosecution. When Housler first met with his appointed counsel, they discussed providing information regarding Taco Bell in exchange for some consideration. Housler began to provide statements incriminating Mathews in the Taco Bell crimes, even though he had never met Mathews. None of these statements were true. However, Housler's purpose was not to tell the truth, or even to help convict Mathews; but simply to get out of jail. Pet. App. A 7a.

Housler first concocted a simple story about Mathews. Housler told his lawyer that he met Courtney Mathews at the Kentucky trailer party on Friday, January 21, 1994; and they had discussed the idea of robbing the place where Mathews worked. Housler's counsel communicated this information to District Attorney Carney, his former law partner, and negotiated bond reduction in exchange for a statement. Housler gave a statement on March 21, 1994, outlining the following:

> He met Mathews during a party at the Kentucky trailer on January 21, 1994.[7] Mathews said in the presence of

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[7] Housler's first statement implicating Mathews states "on Friday, January 21, 1994" he met Mathews. Later, versions changed to "a Friday

> several people, including Housler, that he had a place to rob—his place of work—and that when he did it, he would not leave any witnesses. He also stated that once he committed the robbery, they could read about it in the newspapers. Housler said that's all he knew.

Pet. App. A 7a-8a

Housler was released on bond, and he returned to his home in Kentucky for more than a year. In October 1995, the District Attorney's office informed that Housler would be interviewed, and ordered him to Clarksville. The District Attorney, his staff, and several involved police agencies were actively preparing for the Mathews trial. On or about October 11, 1995, Housler returned to Clarksville, and met with his lawyer, McMillan.[8] Again Housler said that he heard Mathews talking about robbing the Taco Bell and leaving no witness, and "that's all I know." McMillan and Housler met with Assistant DA Garrett, Assistant DA Bush, TBI Agent Puckett, Detective Charvis, and others. Housler was told that others had made statements about him.[9] Prosecutors used these statements to suggest Housler's involvement, showed Housler pictures of the dead victims, and talked about the

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night . . . approximately a week prior to the murders at Taco Bell." (10/20/95 statement.) Both versions are impossible, and not true. Taco Bell time records show that Mathews was at work in Clarksville on both nights, not in Kentucky. Mathews began employment at Taco Bell on January 20, and worked at Taco Bell every weekend night from his employment until the murders. Pet. App. A 12a.; See also Pet. App. J 141a-145a.

[8] The Opinion of the Supreme Court of Tennessee states this meeting occurred in 1994. The Opinion is not correct. The meeting occurred in October 1995. Pet. App. E 71a; Pet. App. F 88a-89a.

[9] The other statements were Michael Miller and Charlie Brown, both inmates trying to also benefit from Taco Bell. Both gave statements implicating Housler. Both later recanted and acknowledged their statements were totally false. Miller and Housler had gotten into a fight in jail, and Miller was exacting some revenge.

death penalty. Several other confrontational meetings occurred. Pet. App. D 61a-67a; Pet. App. E 72a.

The District Attorney and McMillan then negotiated a deal. If Housler was not the actual shooter, the District Attorney agreed to reduced charges and a sentence of 15 years in exchange for "complete cooperation." The deal required Housler to provide a complete proffer or statement detailing the Taco Bell crime. On October 20, 1995, Housler provided his proffer wherein he implicated himself, Sulyn Ulangca, Melanie Darwish, Kevin Tween, and Courtney Mathews. Housler gave great detail about the planning and execution of the crime. None of which was true. Housler placed himself, Sulyn Ulangca, Melanie Darwish, Kevin Tween, and Mathews at Taco Bell, and indicated that Mathews and Tween were the shooters. Pet. App. D 61a-67a; Pet. App. E 72a; Pet. App. I. After doing so, Housler was again released, free again, but not for long.

The Deal Goes Bad

The problem with Housler's proffer or final statement is that it is not true. Less than three weeks later, the District Attorney and the investigating officers had determined that Housler's statement was not true. Kevin Tween, who Housler had described as a shooter, had an alibi. Melanie Darwish had an alibi. Sulyn Ulangca had passed a lie detector test. Nothing else had been corroborated, and the State believed Housler had implicated three innocent people and provided a false statement. McMillan was ordered to bring Housler back to Clarksville. Pet. App. A 11a; Pet. App. E 76a, ADA Bush ["To the best of my recollection, that agreement was based upon Mr. Housler telling the truth and not implicating any innocent individuals. And as I said before, Mr. Housler changed his story so many times that we—I came to a point where I didn't know whether what the truth was? He just—at one point said he was there. Then he came back and said he wasn't there, he had made it all up."] Pet. App. J 141 a-145a.

On November 7, 1995, Housler and McMillan met again with the same prosecuting attorneys and investigating officers. Housler was confronted by an angry prosecution team, and told that Sulyn Ulangca had discredited his statement, and the police believed Ulangca, who was brought to Clarksville to confront him. Housler was arrested. That day, the District Attorney took the false statement, Detective Charvis, and Agent Puckett to the Grand Jury and secured an indictment. The State of Tennessee knew that the Housler statement was bogus, and in fact, Housler was indicted because his statement was false. Pet. App. F 90a-93a.; Pet. App. G 94a-98a, 118a DA Carney ["I indicted him because he had breached that agreement."]

Q. Were those statements [Housler's statements] before the Grand Jury? Did Agent Puckett take the statements to the Grand Jury?
A. [D.A. John Carney] Yes.
Q. The Grand Jury was shown the statements that you had determined by 1:00 were false, is that correct?
A. There were certain things in the statements that were false.
Q. Did you or anybody else in your presence before the Grand Jury describe those differences to the Grand Jury?
A. I didn't.[10]

Pet. App. F 91a.

On the same day that Housler was indicted based solely on the statement, the District Attorney brought Melanie Darwish

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[10] By the time General Carney presented Housler's statement to the Grand Jury he knew that several material aspects of the statement were false, including the involvement of Sulyn Ulangca and Kevin Tween, and the purchase by Housler of a 9 mm. General Carney's agents had already interviewed the alleged seller of the 9 mm and Ulangca and knew that the Housler statement was materially false. General Carney also knew that Housler had again denied being at Taco Bell. Pet. App. F 90a-93a.; Pet. App. G 94a-98a, 118a; Pet. App. H 123a-125a.

and Kevin Tween to the D.A.'s office, interviewed them, and heard their denial of any involvement at Taco Bell. Darwish and Tween were released after questioning, and neither Ulangca, Darwish nor Tween were ever indicted and/or otherwise charged. David Housler has been in jail ever since. Pet. App. D 60a-61a; Pet. App. E 76a; Pet. App. G 95a.

Trial Court

In pretrial proceedings, after the Mathews' conviction, the Housler defense[11] sought to exclude the Housler false state ment and evidentiary hearings were held in the trial court. The defense took the position that because the Housler statement was false it could not be used by the State of Tennessee for any purpose, either to obtain an indictment or to obtain a conviction. Pretrial, the Housler defense called DA Carney, ADA Garrett, the grand jury foreman, and the State's only grand jury witnesses (Puckett and Charvis) who had also testified in the *Mathews* trial.[12] During their respective testimonies, both DA Carney and TBI Agent Puckett, who took Housler's statement, admitted that significant portions of Housler's statement were false.[13] The trial court also recognized this predicament pretrial. ["It is unusual in the sense that based on what the lawyers tell me, the State readily admits that a portion of the defendant's statement is untrue, and may well be untrue in large measure."] Pet. App. P. Despite this finding, the trial court allowed the false statement to be admitted at trial, without correction or redaction.

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[11] The undersigned lawyers were appointed to represent Housler after the murder indictment.

[12] By this time Mathews had been tried and convicted. The transcript of his trial was available and the testimony presented by the State against Mathews could be compared to the Housler statement to prove its falsity. Since DA Carney and ADA Garrett were witnesses to the falsity issue, new prosecutors were appointed to try Housler.

[13] Pet. App.D 44a-67a; Pet. App. F 78a-93a.

In November 1997, the State introduced and used Housler's false statement against him. In fact, Housler's false statement became the only evidence against him, except for persistent efforts by the State to corroborate falsehood with incompetent and false evidence.[14] Housler was convicted of the four murders and sentenced to life on each count. Pet. App. A, 11a-12a.

Throughout the trial the State, relying upon the false statement and perjured testimony, introduced evidence completely inconsistent with their position in the Mathews' prosecution (a sole perpetrator theory) and insisted upon their right to do so. [DA Radford—"Well, first of all, let me address Mr. Terry? I am not bound by any theory that any other attorney had and Mr. Terry has kept saying that's the State's theory. Your honor, I am not bound by that theory. I am entitled to my own theories, in my own prosecution and to think otherwise is ridiculous.] Nothing could be more incorrect. In fact, the State of Tennessee is bound to a truthful theory and obligated to present only truthful facts.

Mathews was called as a witness at the Housler trial. Mathews refused to testify. A motion for new trial was filed and extensive post trial proceedings were conducted, concluding in July of 2000. Post trial, Judge Gasaway made numerous findings, including:

> The Court recognizes that the prosecution of Courtney Mathews and the prosecution David Housler by the State was on different theories

Pet. App. L 185a

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[14] The best example is Larry Underhill, a career criminal who testified that Housler confessed to him in jail that he killed the victims execution style, a rendition that contradicted all crime scene evidence. Underhill had a history of drug and alcohol abuse, and mental health problems. Post-trial Underhill recanted and said he never met Housler, and the information had come from a hallucination. Pet. App. A 28a-29a.

> But Mr. Radford (State prosecutor), the only conclusion that anyone could draw from the prosecution of Mr. Mathews was that the State's theory in the Mathews' trial was more than he was the lone shooter, it was that he was the lone actor.

Pet. App. L 190a

Supreme Court of Tennessee

The Supreme Court of Tennessee granted petitioner's application for appeal and heard this case with both the Mathews' record and the Housler record before it.[15] The court recognized the Housler statement had many known factual falsehoods and that *Mooney*[16] and *Napue*[17] prohibited the use of false evidence.[18] Rather than order relief based on *Mooney*, the court created an exception because the false evidence was the defendant's statement. The Supreme Court of Tennessee concluded that *Mooney* and *Napue* were not applicable, that the State could introduce the many known factual falsehoods if one component of the statement was minimally corroborated.[19]

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[15] The Court of Criminal Appeals first heard the appeal but refused to consider the Mathews' record, so a comparison of the prosecutions was impossible. The Supreme Court granted review and heard the case with both records. Pet. App. O.

[16] *Mooney v. Holohan*, 294 US 103 (1935).

[17] *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959).

[18] The Supreme Court of Tennessee specifically acknowledges some of the known false facts in its opinion. Pet. App. A 12a.

[19] Pet. App. A 19a, 21a.

REASONS FOR GRANTING THE WRIT

The Decision of the Supreme Court of Tennessee Directly Conflicts with Decisions by this Court and the Courts of Appeal on an Important Federal Question.

The Decision of the Supreme Court of Tennessee Has Created a *Mooney* Exception Which Allows the Knowing Use of False Evidence.

Evidence known to be false by the prosecution was admitted in the trial of David Housler. The falsity was not corrected or redacted. These facts are true and undisputed. Prosecutors and police agents admitted before trial that material components of the final Housler statement were false.[20] The Housler statement was originally a proffer as part of his agreement to plead guilty and testify against Mathews. When the State determined the proffer or statement was materially false, the State revoked the plea agreement, and then used the false statement against Housler. The trial recognized found that material components of the statement were false.[21] The Supreme Court of Tennessee specifically found that the Housler statement contained "many known factual falsehoods."[22] Yet, unredacted and uncorrected, the statement was admitted as evidence before the jury even though both parties and the trial judge knew that material components of the statement were false. Rather than stipulate, correct, or redact known falsity, the buck was passed to the jury to filter out the truth, even though all participants knew the truth. This process corrupted the truth seeking function of the trial and deeply offends the purpose for and decisions in support of the Fourteenth Amendment Due Process Clause.

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[20] Pet. App. D 44a-67a; Pet. App. E 76a; Pet App. F 91a-93a,102a-108a,114a,118a,123a125a.

[21] Pet. App. P.

[22] Pet. App. A 12a,19a.

This Court need answer only one question . . . . May the State of Tennessee admit as evidence in a criminal proceeding a defendant's statement knowing that material components of the statement are false without redacting or correcting the false portions? This record is ideal for resolving this issue because the known factual falsehoods are admitted by both parties and the Supreme Court of Tennessee. There is no issue about whether the State of Tennessee knowingly admitted false facts. The only issue is whether or not this knowing use of false evidence violates due process guarantees.

In 1935, this Court in *Mooney v. Holohan*, 294 US 103 (1935) issued a powerful opinion from which there has been no retreat. In *Mooney*, this Court established the clear constitutional principle that the Due Process Clause of the Fourteenth Amendment prohibits the knowing use by the government of evidence which is false. *Mooney* involved the knowing use of perjured testimony and the suppression of exculpatory impeachment evidence. *id.* at 110,111. *See Pyle v. Kansas*, 317 U. S. 213 (1942).

In *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103 (1957) the prosecutor had advised a witness not to volunteer specific information favorable to the defendant. The witness testified falsely to the fact and the prosecutor did not correct. *id.* at 30, 31. This Court cited *Mooney* and *Pyle* and found that due process of law was not accorded when a prosecutor elicited known false testimony and did not correct it. *Alcorta* established an unqualified duty to correct known falsity which has now been erroneously qualified by the Supreme Court of Tennessee.

The *Mooney* principle was restated in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959). In *Napue*, the State had allowed a witness to testify falsely about consideration received for cooperation. This Court found that the false testimony which only affected credibility, and was not substan-

tive, still violated the Due Process Clause, and required reversal. ["The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to credibility to the witness." *id.* at 269.] See *Giglio v. United States*, 408 U.S. 150, 92 S.Ct. 763 (1972) [One prosecutor promised immunity for testimony. Another prosecutor tried the case not knowing of the promise. The witness denied the deal. Reversal required under *Mooney*.]

Mooney and its progeny unequivocally hold that the State cannot knowingly use false evidence or allow false testimony to go uncorrected. This standard does not change when the uncorrected false evidence is the defendant's statement.[23] Writing for the Court in *Napue*, Chief Justice Warren stated the proposition simply and clearly: "A lie is a lie, no matter what its subject, and, if in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth . . ." *Napue*, at, 269, 270.

The scenario in this case is unusual. Usually, when the State uses a defendant's statement over his objection, the State **believes** the information therein to be correct. It is rare, and perhaps only in multiple litigations, where the record demonstrates clearly that the State has used a statement which the State knows is false. Petitioner contends strongly that no party, in any type of litigation, criminal or civil, can use any form of evidence knowing that the information therein is false. To do so is a constitutional violation resulting in the

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[23] "There is nothing in *Napue*, its predecessors, or its progeny, to suggest that the Constitution protects defendants only against the knowing use of perjured testimony. Due process protects defendants against the knowing use of any false evidence by the State, whether it be by document, testimony, or any other form of admissible evidence." *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005).

deprivation of fundamental fairness. To do so corrupts the truth finding process. For purposes of constitutional law, it makes no difference whether the evidence tendered to the jury is false physical evidence or the knowing use of a false statement.

The Supreme Court of Tennessee found that the Housler statement contained many known factual falsehoods. The court recognized that *Mooney* and *Napue*, prohibit a prosecutor's knowing use of false evidence. However, the Supreme Court of Tennessee qualified *Mooney* and *Napue* by concluding the prohibitions did not apply to the knowing use of a defendant's false statement. The court concluded: (1) A defendant's statement with many known factual falsehoods may be admitted as evidence against the defendant if one minimal fact is corroborated; and (2) It is the jury's role to resolve what is true and what is not.[24] This determination by the Supreme Court of Tennessee not only conflicts with the strict prohibitions of *Mooney* and its progeny, but promotes corruption of the truth finding process that is the fundamental purpose of trial.

The important federal question here is whether or not the Supreme Court of Tennessee is correct in carving an exception to *Mooney*? Should *Mooney*'s prohibition against the knowing use of false evidence be qualified when the false evidence is the defendant's statement? If *Mooney* is so qualified, then the Supreme Court of Tennessee is correct and prosecutors may knowingly admit false statements by the defendant. If this *Mooney* exception does not exist, then the Supreme Court of Tennessee is wrong and this Court should grant the Writ of Certiorari to correct and resolve this important federal question.

Any analysis of whether or not the *Mooney* prohibition against the knowing use of false evidence should be qualified

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[24] Pet. App. A 21a.

in this circumstance should begin with a clear understanding of the simple but important reason for excluding the use of false evidence. False evidence is excluded because it corrupts the truth seeking function of the trial process. *United States v. Agurs*, 47 U.S. 97, 104 (1976). Certainly, there should be no argument about the common obligation to protect the truth seeking function of the trial process against any avoidable threat. Perhaps, of the various roles of this Court none is more important than using due process guarantees to assure that the American trial process is best calibrated to determine the truth. In view of this purpose, and common goal, the Supreme Court of Tennessee's qualification of the prohibition against the knowing use of false evidence becomes illogical and dangerous.

It is elementary and universally accepted that the role of the jury is factfinder. This means that the jury is expected to resolve disputed issues of fact. When the parties agree upon a fact, the fact is not disputed. If the parties agree that a fact is true, and the fact is relevant, then the parties may stipulate or otherwise indicate that the fact is true and not disputed. If the parties agree that a fact is false, then the fact is also not disputed, and it becomes illogical to put the fact before the jury without informing the jury that the fact is false.[25] This Court should examine these questions:

> 1. Should a trier of fact, jury or otherwise, be allowed to consider a fact which both parties know is false without being so informed?
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> 2. Does it make any difference if the known false fact is the sworn testimony of a witness or the statement of the defendant?
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> 3. If the purpose of the jury is to resolve disputed facts, is this purpose corrupted or frustrated by pre-

[25] In most circumstances it is illogical and inefficient to put a false fact before the jury at all.

senting the jury with facts that both parties know are false?

In *Banks v. Dretke*, 540 U.S. 668 (2004) this Court held that when prosecutors conceal significant exculpatory or impeaching material, it is ordinarily incumbent on the State to set the record straight. This Court rejected several arguments by the State of Texas designed to shift the burden of correcting the record to the defendant. ["A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendant's due process."] *id.* In the case *sub judice* the Mooney exception, suggested by the Supreme Court of Tennessee, is the same burden shifting proposition which would require a defendant to prove falsity when both parties know and admit the falsity. It is both illogical and inefficient, in view of the truth seeking function, to ask the jury to wander through a maze of cross examination and contradictory testimony to determine that a fact is false, when both parties know the fact is false.[26] Since *Mooney* this Court has always placed the burden to correct known falsity squarely on the prosecution. The Supreme Court of Tennessee's *Mooney* exception places the burden to correct on the defendant and requires the defendant to do it through the adversarial trial process.

In *United States v. Bagley*, 473 U.S. 667 (1985) this Court stated that if the defendant established that the prosecution presented and did not correct false testimony, the falsity will be "considered material unless failure to disclose it would be harmless beyond a reasonable doubt." id. at 680. There can be little doubt that the admission of the Housler statement "with many known factual falsehoods"[27] was material and preju-

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[26] "It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutor's submission as truthful." *Banks v. Dretke*, 540 U. S. 668 (2004).

[27] Pet. App. A 12a, 19a.

dicial error. This Court has observed that "A confession is like no other evidence. Indeed the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246 (1991).[28]

A brief look at some of the particular known false facts in the Housler statement demonstrates with clarity the materiality, prejudice, and impact upon the truth seeking function.[29] For example, in the *Mathews*' trial the State of Tennessee established on the night of the murder Mathews worked at Taco Bell until after 9:00 p.m., went home to his apartment four miles away in Clarksville, Tennessee, and prepared for the crime in front of his roommates. The State used eye witnesses Antaya, Tansil, and Maurizzio to prove that Mathews went back to Taco Bell alone in his own car where he was seen both outside and inside. Later, the State used eye witnesses Sanford and Ceruti to prove that Mathews was inside the Taco Bell, first working with the victims and then alone at 4:30 a.m. The State used witnesses Depto and Dickson to prove where and when Mathews got the weapons. The State used Shawn Depto to prove that Mathews used the shotgun to blow up the Taco Bell safe. As the trial court found and as the District Attorney argued at closing, the Mathews prosecution was not only sole perpetrator but lone actor.[30] [Q. "Did you state to that jury in 1996 General Carney, 'The State of Tennessee says at this point in answering that the evidence in this case is overwhelming, that the evidence in this case points to one person, and that is the

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[28] See also *Bruton v. United States*, 391 U. S. 123, 139-40, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (White, J., dissenting).

[29] See also Pet. App. J 141a-145a, which is a chart comparing known false facts in the Housler statement with competent proof.

[30] The trial court found that the Mathews prosecution a sole perpetrator both at the Mathews trial and before, during, and after the Housler trial. Pet. App. B 31a-32a; Pet. App. L 190a.

defendant (Mathews) right here' and then you indicated with your finger. 'No one else', you said. Did you say that word, in this room to a jury in the Courtney Mathews' case in 1996? A. Yes, I did." Pet. App. G 101a-102a.]

In the Housler trial the State ignored these witnesses. The State did not call Ceruti, Tansil, Sanford, Depto, Peghee, Dickson, Maurizzio or Antaya. Pet. App. 210a-213a.[31] Each of these eye witnesses offered testimony that supported the lone actor theory in *Mathews*, but debunked the false Housler statement.[32] So the State left these eye witnesses on the sidelines and admitted the false Housler statement. Housler was then required to call each of these witnesses in an effort to prove his statement false, a fact known by both parties. Nothing better demonstrates the manipulation of the truth that always accompanies the admission of false evidence.

The Housler statement falsely claims that Mathews, his girlfriend Kendra Corley, Sulyn Ulangca, Kevin Tween, Melanie Darwish, and Housler were at the Kentucky trailer that afternoon and evening. The statement claims that Housler, Mathews, Ulangca, Tween, and Darwish, all left the Kentucky trailer at about 11:00 p.m., stopped at a market, and then went to Taco Bell, where Tween and Mathews went inside and killed the employees during a robbery. The crime would have happened at about midnight.[33] The State admitted before trial that Mathews was at work at Taco Bell on the day of the murders,[34] and was not in Kentucky, that Corley was

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[31] The substance of each of these witness testimony is accurately described in the opinion of the Supreme Court of Tennessee.

[32] This Court should review the testimony of ADA Garrett who tried the Mathews' case and testified as a witness in *Housler*. Garrett testified that each of these witnesses who were called in Mathews by the State to prove that Mathews acted alone were truthful and that he believed their testimony. Pet. App. K 146a-184a.

[33] Pet. App. I 127a-140a.

[34] Pet. App. D 45a-65a; Pet. App. E 76a.; Pet. App. F 91a-93a.

not in Kentucky,[35] that Mathews went from his home in Clarksville to Taco Bell to commit the murders,[36] that Mathews not Housler secured the shotgun and ammunition,[37] that no one stopped that night at the convenience store, and that Darwish, Ulangca, and Tween were not involved[38]. Although each of these admissions was made before trial establishing these facts as false, the facts were presented to the jury in the statement without correction or redaction. If the State had presented these known false facts through a witness, other than Housler, then the result is clearly reversible error. The result should be the same in this case.

Inconsistent Prosecutions for the Same Crime Present Issues of Due Process Which Are Important Federal Questions Which this Court Should Settle.

Those Important Questions Include:

1. Are due process guarantees implicated by inconsistent prosecutions of different individuals for the same crime?

2. If so, what measure of inconsistency is required to support a due process claim?

3. Are the *Mooney* prohibitions against the knowing use of false evidence and the standards for prosecutorial conduct sufficient to guarantee fundamental fairness in separate prosecutions?

One judge tried both the *Mathews* and the *Housler* case. After the Housler trial Judge Gasaway made two findings that bear directly on the second reason for granting a Writ of Certiorari in this case. First, Judge Gasaway found specific-

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[35] Pet. App. D 45a-65a; Pet. App. E 76a ; Pet. App. F 91a-93a.

[36] Pet. App. D 45a-65a; Pet. App. E 76a ; Pet. App. F 91a-93a.

[37] Pet. App. D 45a-65a; Pet. App. E 76a ; Pet. App. F 91a-93a.

[38] Pet. App. D 45a-65a; Pet. App. E 76a ; Pet. App. F 91a-93a.

ally that the Mathews' prosecution and the Housler' prosecution were inconsistent prosecutions, and in fact, he found that the prosecutions were mutually exclusive.[39] Second, Judge Gasaway specifically appealed for appellate instruction on whether or not prosecutions at this level of inconsistency are legally appropriate.[40] Thus, this case presents the record

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[39] "This Court has said—and I don't think that it has really been objected to by the State, perhaps it—perhaps, but this Court has said repeatedly, and still now believes, that you cannot read the Matthews (sic) transcription, you could not have sat through the trial and believed any other thing than the State of Tennessee believed that Courtney B. Matthews (sic) acted alone in the robbery and the killing of the people employed at the Taco Bell Restaurant."

"That was the theory of the State before the trial; it was the theory of the State at the trial; it was the only conclusion that a reasonable mind could draw: That the State of Tennessee believed that Courtney B. Matthews (sic) acted alone in the robbery and the killing of the victims of the Taco Bell Restaurant."

"Thereafter the State indicted and prosecuted David Housler. And the State offered a theory that David Housler acted in consort with Courtney Matthews; that he was in part—that he helped plan it; that he participated in it and that he engaged in the robbery in some sort of supporting role."

"And the Defendant, Housler, has always said and always maintained that the State of Tennessee should not be able to with a straight face in front of two different juries argue two different theories that cannot be—that are mutually exclusive of one another."

Pet. App.M 207a-208a. See also Pet. App. L190a.

[40] "And it has always been this Court's desire for this Court—for this State through its appellate courts to address the issue: Can the State do that? Is that legal?"

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"I most respectfully believe that the issue of the—of whether or not the State can prosecute two different people at two different trials on mutually exclusive theories must be addressed by the Appellate Court."

Pet. App. M 208a.

of two trials with a common judge and a finding by the trial judge that the prosecutions are irreconcilable and mutually exclusive. This is an appropriate record for this Court to address this important federal question and related issues in an area of constitutional law which is obviously unsettled.

More than ten years ago Justice Stevens observed that "Serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens. . . ." *Jacobs v. Scott*, 513 U.S. 1067, 1070 (1995); quoted in *Bradshaw v. Stumpf*, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005). Recent law journals have recognized the importance of this issue on the integrity of the trial, its unsettled state, and have discussed potential solutions.[41]

The Constitution's *Due Process Clause* guarantees every defendant the right to a fair trial. See *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 24-5, 68 L.Ed.2d 640,101 S.Ct. 2153(1981); *Turner v. Louisiana*, 379 U.S. 466, 471-72, 13 L.Ed.2d 424, 85 S.Ct. 546 (1965). This Court has emphasized that "because the prosecutor is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer . . ., it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." *Berger v. United States*, 295 U.S. 78, 88,

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[41] See, e.g. Barry Tarlow, RICO Report: More Prosecutorial Double-Speak, 27 Champion 52, 61 (2004); Steven F. Shatz & Lazuli M. Whitt, The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants, 36 U.S.F. L.Rev. 853 (2002); Anne Bowen Poulin, Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight, 89 Cal.L. Rev. 1423 (2001); Michael Q. English, Note: A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?, 68 Fordham L. Rev. 525 (1999).

79 L.Ed. 1314, 55 S.Ct. 629 (1935), *overruled on other grounds; Stirone v. United States*, 361 U.S. 212, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960).

Several Circuit Court of Appeal have found, or implied, that the use of inconsistent, irreconcilable theories to secure convictions against more than one defendant in prosecutions for the same crime violates the due process clause. *See, e.g., Smith v. Groose*, 205 F.3d 1045 (8th Cir.2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc), *vacated on other grounds*, 523 U. S. 538, 140 L.Ed.2d 728,118 S.Ct. 1489 (1998); *Drake v. Kemp*, 762 F. 2d 1449 (11th Cir. 1985) (en banc) (Clark, J., specially concurring); *cf. Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995); *Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004) reversed in part, vacated in part, and remanded, *Bradshaw v. Stumpf*, 125 S.Ct. 2398; 162 L.Ed.2d 143 (2005).

In 2005 this Court reviewed the Sixth Circuit's decision in *Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004). This Court did not reverse the Sixth Circuit's finding that the use of inconsistent irreconcilable theories to convict two defendants for the same crime is a due process violation. Instead, this Court vacated and remanded the case for further proceedings to determine whether the use of inconsistent theories affected the sentencing panels conclusion. As Justice Souter observed in concurring, *Stumpf* did not present a related Mooney claim.[42] The case *sub judice* is similar to *Stumpf* because it presents a claim of irreconcilably inconsistent prosecution theories. However, this case is different than *Stumpf* because this case also presents a related *Mooney* claim. This case

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[42] "Stumpf's claim as I understand it is not a challenge to the evidentiary basis for arguing the death penalty in either case; nor is it a claim that the prosecution deliberately deceived or attempted to deceive either trial court, as in *Mooney v. Holohan*, 294 U. S. 103 (1935) (per curiam) . . .

would allow the Court to analyze the relationship between inconsistent prosecutions and false evidence.

A due process challenge to the use of inconsistent theories is based on the notion of fundamental fairness; because inconsistent theories render convictions unreliable. Reliability of the process should be a paramount concern of all involved. Prosecutorial inconsistency has many faces. This Court has a history of consistently disapproving prosecutorial inconsistency which impacts the integrity of the process. See *Green v. Georgia*, 442 U.S. 95 (1979) (rejecting prosecutor's attempt to use hearsay rules to prevent defendant from presenting evidence that the prosecutor previously used to convict another defendant of the same crime.); *Miller v. Pate*, 386 U.S. 1 (1967) (condemning prosecutor's use of inconsistent theories in a case involving prosecutor's knowing use of false testimony.)

The Sixth Circuit's decision in *Stumpf* and the Supreme Court of Tennessee's decision in this case cannot be reconciled. In *Stumpf* the Sixth Circuit specifically found that inconsistent prosecutions may present a due process claim. ["On this issue of first impression in this Court, we now join our sister circuits in finding that the use of inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation." supra at 611.] Further the Sixth Circuit found that a due process claim is subject to de novo review and adopted a standard of review. ["The proper standard of review is whether there is reasonable probability that the prosecutors use of inconsistent irreconcilable theories rendered the conviction unreliable." supra at 616.] The Supreme Court of Tennessee refused to review this case as a due process claim, despite the findings of the trial judge that the *Mathews*' prosecution, sole perpetrator/lone actor, and the *Housler* prosecution, multiple perpetrators, were irreconcilably inconsistent and mutually exclusive. Tennessee is in the Sixth Circuit and this Court should issue a Writ of

Certiorari to resolve the conflict between the Sixth Circuit and the Supreme Court of Tennessee, and determine whether or not a due process claim exists for irreconcilably inconsistent prosecutions.

CONCLUSION

The Supreme Court of Tennessee has created an exception to *Mooney* and sanctioned the knowing introduction of false evidence in criminal trials. This Court has scrupulously refused to allow false evidence in any guise without exception. The Ninth Circuit recently observed *en banc*:

> In closing, we must observe that this case is not merely about a peculiar circumstance. As we have noted, this is not the first time we have been confronted in recent years with schemes to place false or distorted evidence before a jury. Our criminal justice system depends on the integrity of the attorneys who present their cases to the jury. When even a single conviction is obtained through perjurious or deceptive means, the entire foundation of our system of justice is weakened.

Hayes v. Brown, 399 F.3d 972,988 (9th Cir. 2005).

The threat to fundamental fairness posed in the form of false evidence exists as much today as when this Court decided *Mooney*. False evidence should have no role in the truth seeking process. No exception should be tolerated. We respectfully pray that a Writ of Certiorari will issue to the Supreme Court of Tennessee.

Respectfully submitted,

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